In the Supreme Court
OF THE
United States

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CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1949

No. 360

RICE GROWERS ASSOCIATION OF CALIFORNIA (a corporation),
Petitioner,

vs.

REDERIAKTIEBOLAGET FRODE (a corporation), owner of the Steamship "Frej",
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner Rice Growers Association of California, hereinafter referred to as petitioner Rice Growers,

respectfully presents to this Honorable Court its petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, to review a decision made and entered by that Court on June 24, 1949. The effect of that decision is to reverse to a limited extent and otherwise to affirm an order of the District Court of the United States for the Northern District of California, Southern Division, in Admiralty, fixing the amount of the limitation of liability fund in a limitation of liability proceeding. The order of the District Court, which fixed the limitation fund at the amount contended for by respondent Rederiaktiebolaget Frode, hereinafter referred to as respondent Frode, was made and entered on August 5, 1948.

A petition for a rehearing filed by petitioner Rice Growers was denied by the Court of Appeals on August 15, 1949. On the same day, the Court also denied a petition for a rehearing filed by respondent Frode.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Petitioner Rice Growers shipped a cargo of rice from San Francisco to Havana aboard the SS "Frej", a vessel owned and operated by respondent Frode. On May 6, 1947, while the "Frej" was still in San Francisco Bay, a fire, which was to last for several hours, broke out aboard. The "Frej" thereafter returned to her San Francisco dock.

The "Frej" was repaired in San Francisco between May 26, 1947, and August 4, 1947.

On June 6, 1947, petitioner Rice Growers filed a libel in the District Court of the United States for the Northern District of California, Southern Division, for the recovery of damages in the amount of $365,990.00. The "Frej" was seized and reduced to the possession of the United States Marshal. She was released from his possession on August 9, 1947, following the filing by respondent Frode of a petition for limitation of liability and of an ad interim stipulation for value. The further prosecution of the libel filed by petitioner Rice Growers was enjoined and all proceedings between the parties were thereafter had in the limitation of liability proceeding.

On June 19, 1947, while the repairs were in progress, and it was known that the "Frej" could be repaired and could complete her voyage, respondent Frode gave a notice purporting to abandon the voyage. After completion of the repairs, however, the "Frej" carried the sound rice to Havana, where discharge was completed on September 18, 1947. That carriage was made pursuant to an agreement of the parties, dated July 26, 1947, to which further reference will be made in the brief in support of this petition.

The amount of the ad interim stipulation for value ($290,250.00) was stipulated to by the parties. Instead of having the amount of the limitation fund determined by a commissioner, the parties submitted the question to the District Court on an agreed statement of facts, entitled "Stipulation re Value" (R-45) on the basis of which the District Court made the order from which this appeal was taken. The following values were stipulated to for the "Frej":

Date	*Value*
(1) Immediately before the fire—(May 6, 1947)	$255,000.00
(2) Immediately following the fire—(May 8, 1947)	106,000.00
(3) On the day on which respondent Frode gave the notice of abandonment—(June 19, 1947)	117,000.00
(4) On the day on which the District Court made its order as to the filing by respondent Frode of an ad interim stipulation—(August 4, 1947)	275,000.00
(5) On the day of the completion of the unloading operations in Cuba—(September 18, 1947)	275,000.00

The parties also stipulated to certain values for the stores of the "Frej" and to the amount of the aggregate bill of lading charges.

The contention of petitioner Rice Growers was and is that the limitation fund should be determined as of September 18, or in the alternative, August 4.

The District Court held that the value of the "Frej" (and of her stores) was to be determined as of June 19, the day on which respondent Frode gave the notice purporting to abandon the voyage. As to the amount of pending freight, the District Court held that the bill of lading charge listed as "ocean freight" ($93,104.00) should alone be included in the limitation fund and rejected the contention of petitioner Rice Growers that the fund should also include various other bill of lading charges amounting to $8,873.03.

Petitioner Rice Growers appealed from the order of the District Court. The Court of Appeals affirmed that order insofar as it held that the value of the "Frej" was to be determined as of June 19. The Court of Appeals reversed the order, however, insofar as it held that the ocean freight alone was to be included in the limitation fund and directed the District Court to include the additional $8,873.03 in the pending freight.

This petition for a writ of certiorari seeks a review of only that part of the decision of the Court of Appeals holding that the value of the "Frej" for limitation purposes is to be determined as of June 19, 1947. No question is raised as to the decision of the Court of Appeals dealing with the amount of pending freight.

JURISDICTION.

This proceeding for exoneration from or limitation of liability was brought by respondent Frode, as the owner of the "Frej", under the provisions of 46 U.S. Code, Sections 181-189 inclusive.

The petition alleged that a fire broke out aboard the "Frej" as she was leaving San Francisco on a voyage to Havana and that the total claims against her were or might be in excess of her value and the value of her pending freight at the end of her voyage. The petition prayed for exoneration from liability for the consequences of that fire or, in the alternative, for limitation of liability therefor.

Two claims were filed in the District Court, one by petitioner Rice Growers for damage to its cargo and the other by salvage claimants who are not parties to this appeal. The two claims were in excess of the value of the "Frej" and her pending freight.

An ad interim stipulation for value was filed by respondent Frode and the District Court thereafter made the order fixing the amount of the limitation fund from which this appeal was taken.

The Appellate jurisdiction of the Court of Appeals rests upon 28 U.S. Code, Sections 225(a) and 227 (now 28 U.S. Code, Sections 1291 and 1292).

The order appealed from was held by the Court of Appeals to be an appealable interlocutory order "determining the rights and liabilities of the parties" (28 U.S. Code, Section 227), in *Rice Growers Association of California v. Rederiaktiebolaget Frode* (December 13, 1948), 171 F. (2d) 662.

The jurisdiction of this Court rests upon 28 U.S. Code, Section 1254 (1).

The order denying a rehearing was made and entered by the Court of Appeals on August 15, 1949.

This petition will be filed on or before October 3, 1949, or well within the ninety (90) day period allowed by 28 U.S. Code, Section 2101. A stay of the mandate of the Court of Appeals until final disposition of the case by this Court has been obtained, conditioned on the filing of this petition on or before October 3, 1949.

QUESTION PRESENTED.

The only question presented is the question of the date as of which the "Frej" is to be valued for limitation purposes. The parties and the Court of Appeals agree that her value at the end of her voyage is controlling. The question accordingly is whether the Court of Appeals was correct in holding that, for limitation purposes, the voyage of the "Frej" ended in San Francisco on June 19, 1947, upon the mere giving of a notice by respondent Frode, or whether the Court of Appeals should have held that the voyage ended upon completion of the unloading operations in Havana on September 18, 1947, or, in the alternative, that it ended not earlier than August 4, 1947, upon the filing of the petition for limitation of liability and the posting of the necessary security by respondent Frode.

REASONS RELIED UPON FOR ISSUANCE OF WRIT.

The Court of Appeals restates the established rule that, for limitation purposes, valuation must be had as of the end of the voyage. The Court of Appeals then proceeds to destroy that rule with the announcement that the voyage may in effect be terminated and valuation accordingly be had at any time the shipowner pleases, the only restriction being that claims arising out of the voyage should exceed the value of the vessel. The Court of Appeals further holds that the right to so terminate his voyage is given the shipowner by the limitation statute and that he can invoke

that right without first complying with any of the requirements of the statute.

The following are the special and important reasons relied upon by petitioner Rice Growers for the issuance of a writ of certiorari:

(1) The decision of the Court of Appeals is in conflict with the decisions of this Court in *The City of Norwich,* 118 U.S. 468, 6 S.Ct. 1150, 30 L.ed. 134, *The Great Western,* 118 U.S. 520, 6 S.Ct. 1174, 30 L.ed. 156, and *The Maggie Hammond,* 9 Wall. 435, 19 L.ed. 772.

The City of Norwich and *The Great Western* hold that limitation of liability can be had only at the end of the voyage. *The Maggie Hammond* holds that a voyage can be lawfully terminated short of destination only in the event that the vessel is lost or so damaged as to make it unreasonable for her owner to repair her.

The cumulative effect of those three decisions is that limitation of liability cannot be had short of destination, unless the vessel was lost or was so damaged as to make it unreasonable for her owner to repair her.

The effect of the decision of the Court of Appeals is, however, that a voyage *can* be terminated short of destination even though the vessel was neither lost nor so damaged as to make it unreasonable for her owner to repair her and that limitation of liability can thus be had *before* the lawful end of the voyage.

(2) The decision of the Court of Appeals is in conflict with the decision of this Court in *Hartford Accident Co. v. Sou. Pacific,* 273 U.S. 207, 47 S.Ct. 357, 71 L.ed. 612, with the decision of the Circuit Court of Appeals for the Second Circuit in *The Salvore,* 36 F. (2d) 712, and with its own decision in the first appeal in this case (*Rice Growers Association of California v. Rederiaktiebolaget Frode,* 171 F. (2d) 662).

Hartford Accident Co. v. Sou. Pacific and *Rice Growers Association of California v. Rederiaktiebolaget Frode* hold that a limitation of liability proceeding is equitable in nature. Applying that rule, *The Salvore* holds that a shipowner must do equity before coming into Court and asking, by the filing of a petition for limitation of liability, that equity be done unto him.

The effect of the decision of the Court of Appeals in this case, however, is that the shipowner need not do equity before asking, by the filing of a petition for limitation of liability, that equity be done unto him. The decision of the Court of Appeals recognizes that the purported abandonment of the voyage on June 19, 1947, was wrongful and amounted to a breach of contract. The Court nevertheless gives respondent Frode the relief to which it claims to be entitled by virtue of that breach of contract. The effect of the decision accordingly is that it makes no difference whether or not the termination was wrongful and that a shipowner is now entitled to the equitable relief afforded him by the limitation statute, even though he himself has utterly failed to do equity.

(3) The decision of the Court of Appeals is in conflict with the decision of this Court in *The Main v. Williams,* 152 U.S. 122, 14 S.Ct. 486, 38 L.ed. 381, and in *La Bourgogne,* 210 U.S. 95, 28 S.Ct. 664, 52 L.ed. 973.

The Main v. Williams and *La Bourgogne* hold that the preliminary issue of compliance with the requirements of the limitation statute, which arises *before* any question can arise as to whether the shipowner is entitled to any of the benefits of the statute, must be *strictly* determined against the shipowner.

The Court of Appeals holds (citing the decisions of this Court in *Just v. Chambers,* 312 U.S. 383, 61 S.Ct. 687, 85 L.ed. 903, and *Coryell v. Phipps,* 317 U.S. 406, 63 S.Ct. 291, 87 L.ed. 363) that the limitation statute must be liberally construed in favor of the shipowner. The Court of Appeals ignores the fact, however, that neither *Just v. Chambers* nor *Coryell v. Phipps* have anything whatever to do with the question of valuation. Both cases deal with the question of the liability of the shipowner and in both cases the issues as to which this Court held that the statute should be liberally construed arose *after* the shipowner had complied with all the requirements which opened the door to the proceeding, whereas the issue in this case is the *preliminary* issue of compliance with the requirements of the statute.

(4) The decision of the Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Petition of Goulandris,*

140 F. (2d) 780, cert. den. 322 U.S. 755, 64 S.Ct. 1268, 88 L.ed. 1584.

Petition of Goulandris holds that the requirements of the limitation statute must be complied with *before* the shipowner can claim any of the benefits provided thereunder.

The Court of Appeals holds, however, that the shipowner *can* claim a benefit under the limitation statute *without* complying with its requirements. The Court of Appeals holds that the right to terminate the voyage short of destination (irrespective of whether the vessel was lost or so damaged as to make it unreasonable to repair her) is a right given the shipowner *by* the limitation statute. If that right *is* given by the statute, however, the time when the statute is invoked is the only possible time when the voyage can be terminated. The Court of Appeals nevertheless holds that that right can be invoked long before the statute itself is invoked and before its requirements are complied with by the filing of the petition and the posting of the necessary security. (In this case, the notice of abandonment was sent on June 19, whereas the statute was not complied with until August 4.)

(5) If previous decisions be deemed not to have passed upon the precise question raised in this case (whether, short of destination, a voyage can be terminated even though the vessel was neither lost nor so damaged as to make it unreasonable to repair her), the Court of Appeals must then be regarded as having decided in this case a question of Admiralty law which

has not yet been settled, and which, because of its importance to the maritime world, should be finally settled by this Court. The test of the end of the voyage, which was heretofore applied, was a test over which the shipowner had no control. The Court of Appeals replaced it by a test over which the shipowner has exclusive control. The question is of sufficient importance to the entire maritime world to call for a direct pronouncement from this Court. If the law is thus to be changed, it should be changed by the Supreme Court of the United States.

Wherefore, petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the decision of that Court in this case, and submits, attached hereto, its brief in support of this petition.

Dated, San Francisco, California,
September 28, 1949.

Respectfully submitted,
GEORGE H. HAUERKEN,
Proctor for Petitioner.

HAUERKEN & ST. CLAIR,
Of Counsel.

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vs.

REDERIAKTIEBOLAGET FRODE (a corporation), owner of the Steamship "Frej", *Respondent.*

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS.

The order of the District Court from which this appeal was taken was made and entered on August 5, 1948 (R-54). No opinion was filed by the Court and the order itself is not reported.

On December 13, 1948, the Court of Appeals made and filed an order (R-95) holding the order of the

District Court to be appealable and denying a motion to dismiss the appeal theretofore made by respondent Frode. The order of the Court of Appeals was made pursuant to an opinion rendered and filed on the same date and reported in 171 Fed. (2d) 662 under the name of *Rice Growers Association of California v. Rederiaktiebolaget Frode.* (R-96.)

The opinion of the Court of Appeals which this petition seeks to review was rendered and filed on June 24, 1949. (R-101.) It has not yet been reported. Judgment was entered thereon on June 24, 1949. (R-111.)

Petitions for a rehearing were filed in the Court of Appeals by both petitioner Rice Growers and respondent Frode and were denied on August 15, 1949. (R-112.)

JURISDICTION.

This proceeding for exoneration from or limitation of liability was brought by respondent Frode in the District Court of the United States for the Northern District of California, Southern Division, in Admiralty, under the provisions of 46 U.S. Code, Sections 181-189 inclusive.

Respondent Frode alleged in its petition (R-2) that it was the owner of the "Frej", that a fire broke out aboard as she was leaving San Francisco on a voyage to Havana and that the total claims against her were or might be in excess of her value and the value of her pending freight at the end of her voyage. The petition prayed for exoneration from liability for the conse-

quence of that fire, or, in the alternative, for limitation of liability therefor.

The claims were filed in the District Court, one by petitioner Rice Growers for damage to its cargo (R-75) and the other by salvage claimants who are not parties to this appeal. The two claims were in excess of the value of the "Frej" and her pending freight.

An ad interim stipulation for value in an amount stipulated to by the parties was filed by respondent Frode and the question of the amount of the limitations fund was thereafter submitted to the District Court on an agreed statement of facts. The District Court made an order fixing the amount of the limitation fund at $213,104, from which order this appeal was taken to the United States Court of Appeals for the Ninth Circuit.

The appellate jurisdiction of the Court of Appeals rested upon 28 U.S. Code, Sections 225 (a) and 227 (now 28 U.S. Code, Sections 1291 and 1292). In *Rice Growers Association of California v. Rederiaktiebolaget Frode,* 171 F. (2d) 662, the order appealed from was held by the Court of Appeals to be an appealable interlocutory order "determining the rights and liabilities of the parties." (28 U.S. Code, Section 227.)

The jurisdiction of this Honorable Court to review the judgment of the Court of Appeals rests upon 28 U.S. Code, Section 1254 (1).

The order denying a rehearing was made and entered by the Court of Appeals on August 15, 1949.

This brief and the accompanying petition will be filed on or before October 3, 1949, or well within the 90 day period allowed by 28 U.S. Code, Section 2101.

STATEMENT OF FACTS.

Petitioner Rice Growers shipped approximately 5060 tons of non-perishable rice from San Francisco to Havana aboard the "Frej", a vessel owned and operated by respondent Frode. (R-46.) The "Frej" left her San Francisco dock in the evening of May 6, 1947. (R-46.) Within an hour, and while she was still in San Francisco Bay, a fire broke out aboard. (R-46.) The fire was extinguished in the early morning hours of the next day, whereupon the "Frej" returned to her dock at San Francisco. (R-46.) The entire cargo was unloaded. (R-46.) The rice affected and damaged by water, smoke and fire was disposed of in the San Francisco Bay region while the balance (over 3200 tons) was carried to Havana by the "Frej". (R-47.)

On June 6, 1947, petitioner Rice Growers filed a libel in the District Court of the United States for the Northern District of California, Southern Division, for the recovery of damages in the amount of $365,990. (R-48.) The "Frej" was seized and reduced to the possession of the United States Marshal. (R-48.) She remained in his possession until August 9, 1947 (R-48), when she was released following the filing by respondent Frode of a petition for limitation of liability (R-2) and of an ad interim stipulation for value.

(R-15.) The further prosecution of the libel filed by petitioner Rice Growers was enjoined (R-22) and all proceedings between the parties were thereafter had in the limitation of liability proceeding.

The "Frej" was repaired in San Francisco between May 26, 1947, and August 4, 1947. (R-47.) On June 19, 1947, respondent Frode gave a notice purporting to abandon the voyage. (Exhibit B, R-51.) Thereupon the libel filed by petitioner Rice Growers was amended to include a second cause of action in which petitioner Rice Growers demanded damages in the amount of $95,000 to cover the cost of forwarding the sound rice to Cuba. (R-48.) After completion of the repairs, however, the "Frej" carried the sound rice to Havana with no other cargo aboard. (R-49.) Discharge at Havana was completed on September 18, 1947. (R-49.) That carriage was made pursuant to an agreement of the parties (Exhibit C, R-51), the effect of which was in substance that (1) the "Frej" would carry the sound rice to destination; (2) respondent Frode received an additional $10,000 to which it was not otherwise entitled; and (3) petitioner Rice Growers dismissed the second cause of action of its libel without prejudice, thus saving respondent Frode the necessity of defending a $95,000 action for breach of contract.

The agreement also contained the following clause:

> "6. The carrying on of the cargo and/or *this agreement shall in no way prejudice any right or rights which either party now has* and shall not affect the present status quo of the purported

abandonment of the voyage at San Francisco, California." (Italics added.)

For the purpose of the limitation fund the parties have stipulated to the following values for the "Frej" and her stores (R-50):

Date	Vessel	Stores	Total
(1) Immediately before the fire—(May 6, 1947)....	$255,000	$16,845	$271,845
(2) Immediately following the fire—(May 8, 1947)	106,000	8,329	114,329
(3) On the day on which respondent Frode gave the notice of abandonment—(June 19, 1947).	117,000	3,000	120,000
(4) On the day on which the District Court made its order as to the filing by Frode of an ad interim stipulation—(August 4, 1947)	275,000	21,825	296,825
(5) On the day of the completion of the unloading operations in Cuba—(September 18, 1947)..	275,000	16,005	291,005

The parties have also stipulated to the aggregate bill of lading charges in the sum of $101,977.03.

The position of petitioner Rice Growers was and is that the limitation fund should be determined as of September 18th or, in the alternative, as of August 4th.

The District Court held that the value of the "Frej" and her stores was to be determined as of June 19th, the day on which respondent Frode gave the notice purporting to abandon the voyage. The District Court also held that only the ocean freight ($93,104.00) was to be included in the fund and rejected the contention

of petitioner Rice Growers that the fund should also include, as part of the freight pending, various handling, manifest and wharfage charges. ($8,873.03.)

The Court of Appeals affirmed the order insofar as it held that the value of the "Frej" and of her stores was to be determined as of June 19th. The Court of Appeals reversed the order, however, insofar as it held that the ocean freight alone was to be included in the limitation fund and directed the District Court to amend its order so as to include an additional $8,873.03 in the pending freight.

This petition for a writ of certiorari only seeks a review of that part of the decision of the Court of Appeals holding that the value of the "Frej" and of her stores is to be determined as of June 19, 1947. No question is raised as to the decision of the Court of Appeals dealing with the amount of pending freight.

SPECIFICATION OF ERRORS.

The following specification of errors is relied upon by petitioner Rice Growers:

(1) The Court of Appeals erred in holding that the voyage of the "Frej" was terminated in San Francisco, on June 19, 1947, and in fixing the limitation fund at $221,977.03, instead of holding that the voyage of the "Frej" ended in Havana, Cuba, on September 18, 1947, and of fixing the limitation fund at $392,982.03.

(2) Assuming that the Court of Appeals was justified in fixing the amount of the limitation of liability fund as of a date earlier than the date of the end of the voyage (September 18, 1947), the Court erred in adopting June 19, 1947, as such date, instead of August 4, 1947, the date as of which respondent Frode invoked the limitation statute by filing its petition and posting its ad interim stipulation for value.

ARGUMENT.

SPECIFICATION OF ERRORS 1.

The Court of Appeals erred in holding that the voyage of the "Frej" was terminated in San Francisco, on June 19, 1947, and in fixing the limitation fund at $221,977.03, instead of holding that the voyage of the "Frej" ended in Havana, Cuba, on September 18, 1947, and of fixing the limitation fund at $392,982.03.

(a) The limitation fund is to be determined as of the end of the voyage. It has repeatedly been held that the end of the voyage is determined either by the fact of the arrival of the ship at destination or by the physical inability of the ship to arrive at destination. In this case, however, although the "Frej" was able to proceed to destination (in fact, she did), the Court of Appeals allowed respondent Frode to choose the time of the end of the voyage without regard for the physical facts.

The right of respondent Frode to limit liability for the damage resulting from the fire is yet to be determined. That right is entirely statutory and, before the question of whether or not it is entitled to

limit its liability can be litigated, respondent Frode must comply with the statutory requirements as to the giving of adequate security to the damage claimants. The pertinent part of the statute (46 U. S. Code, Sec. 185) is as follows:

> "The vessel owner, wthin six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, ... Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease."

Section 185 does not specify the *time* as of which the limitation of liability fund is to be fixed. It is settled, however, (or it was settled before the decision of the Court of Appeals in this case) that the limitation of liability fund is to be fixed as of the *end of the voyage.*

In *The City of Norwich,* 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134, the owner of the "City of Norwich" sought to limit its liability following a collision in which she sank. This Court held that the sinking

terminated her voyage and that, for limitation of liability purposes, her value was to be taken as she was lying at the bottom of the ocean.

In *The Great Western,* 118 U. S. 520, 6 S. Ct. 1174, 30 L. ed. 156, the owner of the "Great Western" sought to limit his liability following a collision between the "Great Western" and the "Daphne." The "Great Western" suffered no damage therefrom, but she was later stranded and wrecked, shortly before reaching her destination, from causes unrelated to the collision. The owner of the "Daphne" contended that the value of the "Great Western" immediately after the collision ($150,000.00) should be used for limitation purposes. This Court held, however, that her value should be taken as of the end of her voyage, that her voyage ended with her sinking, and that her value as a sunken wreck ($1800.00) should accordingly be used for limitation purposes.

In *The Lara,* (1946, U. S. District Court for the Southern District of New York), 1947 A.M.C. 27, the facts were such that the rule of the "Great Western" worked for the benefit of the damage claimant instead of the shipowner. The "Lara" was involved in a collision while on a voyage from New York to Colombia. She was repaired in Florida and after the completion of her repairs she proceeded on her voyage; but, instead of meeting with a further casualty, as the "Great Western" did, she arrived at destination. The contention of the damage claimant, which was upheld, was precisely the contention made

by petitioner Rice Growers in this case, namely, that the value of the vessel at the end of her voyage should be used for limitation purposes, including the value of her repairs.

This Court has made it clear, by the recent amendment to Rule 51 of the Admiralty Rules, that the limitation fund is to be fixed as of the end of the voyage. Rule 51 now requires the petition for limitation of liability to set forth:

> "The *voyage* on which the demands sought to be limited arose, with the date and place of its termination; . . . . The value of the vessel at the *close of the voyage or, in case of wreck,* the value of her wreckage, strippings or proceeds, if any, ..." (italics added)

Rule 51 further provides that the ad interim stipulation shall be for:

> "The value of petitioner's interest in the vessel at the *close of the voyage, or, in the case of wreck,* the value of the wreckage, strippings or proceeds, ..." (italics added)

It is clear, therefore, that, in and of itself, the time of the collision, fire, or other sea casualty, for which a vessel may incur liability, and in which she herself may be damaged, has no bearing upon the time as of which her value is to be taken for limitation of liability purposes. Both the owner of the vessel involved in an accident and the persons to whom he may be liable as the result of that accident must await the end of her voyage. The owner is required to put up

no more than her value at that time, irrespective of her value at the time of her accident, while the damage claimants must run the risk of her burning and sinking (as the "Great Western" sank) during the latter part of her voyage. On the other hand, a vessel may appreciate in value during her voyage, and, irrespective of the cause of that appreciation, her owner must take the risk of her being worth more at the end of that voyage (The "Lara") just as the damage claimants take the risk of her being worth less. The owner is not entitled to limit his liability to the value of his vessel immediately after the accident *or* to her value at the end of her voyage, whichever is less. He is only entitled to limit his liability to her value at the end of her voyage, irrespective of what her value may have been at any time during the voyage.

The question, therefore, reduces itself in this case to whether or not the notice of abandonment given by respondent Frode had the effect of legally terminating the voyage of the "Frej".

(b) Under the maritime law, respondent Frode had no right to abandon the voyage. On the contrary, it had the duty to repair, refit and proceed to destination.

The applicable law was settled long ago in *The Maggie Hammond,* 9 Wall. 435, 19 L. ed. 772. The "Maggie Hammond" was damaged on a voyage from Scotland to Montreal and forced to seek refuge in a Welsh port. After repairs had been made, she was certified to be in a "seaworthy state to proceed on her

intended voyage." Her master, however, refused to reload the cargo and proceed to fulfill the contract. A libel was then filed by the cargo owner. In affirming the decree awarding him damages, this Court stated:

"As agent of the owners the master is bound to carry the goods to their place of destination in his own ship, unless he is prevented from so doing by the act of God, the public enemy, or by the act of the shipper, or from some one of the perils expressly excepted in the contract of shipment. When the vessel is wrecked, or otherwise disabled in the course of the voyage, and cannot be seasonably repaired to perform the voyage, or cannot be repaired without too great delay and expense, the master is at liberty to transship the goods and send them forward in another vessel, so as to earn the whole freight, but he is not entitled to recover for freight if he refuses to transship the goods, unless he repairs his own vessel within a reasonable time and carries them on to the place of delivery. * * * (19 L. ed. at p. 780.)

Duties remain to be performed by the master or the owner, after the vessel is disabled. His obligation of safe custody, due transport, and right delivery still continues and is by no means discharged or lessened while it appears that the goods have not perished in the disaster. * * *

Nothing will excuse the carrier under such circumstances but the causes stipulated in the bill of lading, and he is still bound, by virtue of his original contract, to use his utmost exertions to transport or send forward the goods to the port of delivery." (19 L. ed. at p. 781.)"

The rule announced in *The Maggie Hammond*, supra, is recognized throughout the maritime world. In *Carver on Carriage of Goods by Sea* (8th ed., 1938) the shipowner is said at page 460 to be

> "bound to repair and complete the voyage, unless the damage by excepted perils is such that it would be unreasonable to require him to repair her . . . where the shipowner has in fact repaired the ship at the port of refuge, and might have carried on the cargo in her, his failure to do so is a breach of the contract, whether the repairing could reasonably have been required or not."

The leading British case is that of *Assicurazioni Generali v. SS. Bessie Morris Co.* (1892) 1 Q. B. 571, affirmed by the Court of Appeal in VII Aspinall's Reports (N.S.) 217 in which the Court of Queen's Bench said at pages 576 and 577:

> "The duty of the shipowner is to complete the voyage if he can. If, owing to the perils of the seas, he is compelled to put into an intermediate port for repair his duty is to refit and carry on such part of the original cargo as is fit to be carried on . . . In a case of this description the original voyage is not regarded as broken up into two, viz., first, into one voyage from the port of sailing to the port of refuge, and secondly, into another voyage from such port to the port of destination.
>
> . . . the voyage was not properly determined at Gibraltar (the port of refuge) unless its completion on the original terms was either physically impossible or so clearly unreasonable as to be impossible in a business point of view.

. . . I am not aware of any case which has decided that any expense short of . . . an expense greater than the value of the ship and freight when repaired sufficiently to complete the voyage, would be so clearly unreasonable as to be impossible in a business point of view." (italics added.)

In this case, however, none of the grounds upon which a shipowner is justified in abandoning a voyage were present. The "Frej" was neither lost nor so damaged as to make it unreasonable for respondent Frode to repair her. On the contrary it was known at all times, including June 19, 1947, that her repairs would not result in unreasonable delay, particularly in view of the fact that the cargo was not perishable, and that the cost of repairs would not exceed her value when repaired.

Four bids were received (R-46), under which repairs were to require from 20 to 48 days. On May 23, 1947, respondent Frode accepted the bid calling for forty-eight days, instead of the bid calling for twenty days, and repairs were actually begun on May 26, 1947. The work had accordingly been in progress for twenty-four days when respondent Frode sent the notice purporting to abandon the voyage. Respondent Frode knew at that time that the repairs would probably be completed in twenty-four more days, and that the "Frej" could complete her voyage within a reasonable time. The best proof that she was able to do so is, of course, the fact that she did complete her voyage.

In *Assicurazioni Generali v. SS. Bessie Morris Co.*, supra, (the case announcing that, in England, as in this country under *The Maggie Hammond,* supra, the law imposes on the shipowner the duty to proceed on his voyage whenever the expense of repairing the ship is "no greater than the value of the ship and freight when repaired sufficiently to complete the voyage"), the Court of Appeal stated:

> "Perhaps the shipowner might have been justified in treating the ship as incapable of being repaired but he did not do so. *It is absurd to argue that the shipowner can say that he was prevented from fulfilling his contract by perils of the sea by reason of the great expense of repairing, when he did in fact repair and proceed upon a voyage.* Here, therefore, the completion of the voyage was not prevented by the perils of the sea and the abandonment of the contract was unjustifiable ..." VII Aspinall's Reports (N.S.) 217 at 219. (Italics added.)

In this case, as in the *Assicurazioni Generali* case, the shipowner is making the *absurd* contention that it did not and could not do what, in fact, it did. That contention should be treated by this Court as the Court of Appeals treated it in the *Assicurazioni Generali* case:

> "If the shipowner acts upon the view that it is possible to repair the vessel and proceed, it is then clear that it is not impossible to do so, and it becomes absurd to discuss the question of constructive total loss . . ." (VII Aspinall's Reports (N.S.) 217 at 218.)

It is clear, therefore, that respondent Frode had no right not to continue the voyage to destination and that the purported abandonment of the voyage cannot be regarded as the end of the voyage within the meaning of the rule announced by this Court in the *City of Norwich,* supra, and *The Great Western,* supra, for the purpose of fixing the amount of the limitation fund.

(c) A limitation proceeding is an equitable proceeding. Since respondent Frode had no right to terminate the voyage in San Francisco, the purported abandonment was a breach of contract. Such an unlawful act cannot fix the date as of which the limitation fund is to be determined.

A limitation proceeding is "equitable in its nature". *Hartford Accident Co. v. Sou. Pacific,* 273 U.S. 207, 47 S.Ct. 357, 71 L.ed. 612; *Rice Growers of California v. Rederiaktiebolaget Frode,* 171 Fed. (2d) 662.

The use of equitable powers in a limitation proceeding is shown by *The Salvore* (C.C.A. 2, 1929), 36 Fed. (2d) 712. Before the filing of a petition for limitation of liability by the owner of the "Salvore" a libel in personam had been filed by a cargo owner, and a ship other than the "Salvore" had been seized under a writ of foreign attachment. The shipowner thereafter sued the cargo owner in Italy for unlawful attachment and then petitioned for limitation of liability in New York, where the original libel had been filed, and obtained an injunction. The cargo owner moved that the shipowner be required to dismiss the Italian action, or, in the alternative, that the injunction in the limitation proceeding be dissolved.

The Circuit Court of Appeals for the 2d Circuit ordered the District Court to dissolve the injunction, unless the shipowner stayed the trial of the Italian action until the determination of the cargo owner's claim.

The court stated:

> "The limitation proceeding was an appeal to a court of admiralty, which is a court of equity, invoking the aid of the court, and the appellee, seeking equity, should willingly do equity . . . "
> (36 Fed. (2d) at 713.)

> "The court below having obtained prior jurisdiction of the parties, and the appellee having sought that same jurisdiction in its limitation proceedings, unquestionably gave the court the power to deal with the appellee before it as equity and justice required."
> (36 Fed. (2d) at 714)

Thus, the court imposed upon the party seeking the benefit of the limitation statute the equitable condition that that party do equity before he could receive equity.

In this proceeding respondent Frode, not petitioner Rice Growers, is the party seeking equitable relief. This Court should accordingly inquire, as both the Court of Appeals and the District Court should have inquired, whether the conduct of Respondent Frode, is such as to entitle it to the aid of a court.

Respondent Frode in effect came into court, having deliberately breached its contract of carriage and

asked that it be allowed to take advantage of that deliberate breach. This court should clearly announce the rule that, under such circumstances, a wrongdoer is to be denied the right to invoke the limitation statute. In the alternative, this court should clearly announce the rule that, if a wrongdoer is to be granted the right to seek limitation of liability under such circumstances, he can do so only on the condition that innocent damage claimants be placed in the same position in which they would be if the contract of carriage had not been breached. In this case, Respondent Frode should accordingly be required to post a bond covering the value of the "Frej" at the lawful end of her voyage, on September 18, 1947, in Havana.

(d) The issue in this case is the issue of preliminary compliance with the requirements of the limitation statute, not an issue arising after the shipowner has complied with all of the requirements of the statute. That issue of preliminary compliance with the requirements of the statute must be strictly determined against the shipowner.

The Court of Appeals purports to find support for its decision in the cases of *Just v. Chambers,* 312 U.S. 383, 61 S.Ct. 687, 85 L.ed. 903, and *Coryell v. Phipps,* 317 U.S. 406, 63 S.Ct. 291, 87 L.ed. 363, in which this Court held that the limitation of liability statute must be liberally construed in favor of the shipowner.

It must first be determined, however, whether the issue calls for a construction of the statute. The issue raised in this case (the termination of the voyage) does not call for any construction of the statute, for the simple reason that the statute does not purport to come

into effect until it has otherwise been determined that the voyage is at an end. The statute assumes that, under the general maritime law, the voyage is at an end; it does not concern itself with how it ended, whether by arrival at destination or by destruction of the vessel short of destination. Nor does it purport to give to the shipowner a right to terminate his voyage which is denied him by the general maritime law. (See *The Maggie Hammond,* 9 Wall. 435, 19 L. ed. 772; *Assicurzioni Generali v. SS. Bessie Morris Co.,* VII Aspinall's Reports (N.S.) 217.

Neither *Coryell v. Phipps,* supra, nor *Just v. Chambers,* supra, have anything whatever to do with the question of valuation. The latter case deals with the question of the enforceability in admiralty of claims for personal injuries against the estate of a deceased shipowner. In the former case, this Honorable Court was concerned with the question of privity and knowledge of the shipowner. In both *Just v. Chambers,* supra, and *Coryell v. Phipps,* supra, therefore, the issues as to which this Court stated that the statute should be liberally construed arose *after* the shipowner had complied with all the requirements which open the door to the proceedings. There was apparently no question as to when and where the voyage terminated in those cases. Moreover, both Chambers and Phipps had apparently posted the security necessary to enable them to insist upon a liberal construction of the limitation statute. The issue in this case, however, arises *before* the gate of the statute is opened and there is no authority for the proposition that an

issue of that kind should be liberally determined in favor of the shipowner. On the contrary, this Court has twice held that the issue of compliance with the *preliminary* requirements of the statute must be strictly determined against the shipowner.

In *The Main v. Williams,* 152 U.S. 122, 14 S.Ct. 486, 38 L.ed. 381, in dealing with the question of valuation and in determining what the shipowner had to surrender as freight, this Court stated at page 385 of 38 L.ed.:

> "The English courts have held, very properly we think, that these statutes should be strictly construed. As observed by Abbott, Ch. J., in *Gale v. Laurie,* 5 Barn.&C. 156, 164: 'Their effect, however, is to take away or abridge the right of recovering damages, enjoyed by the subjects of this country at the common law, and there is nothing to require a construction more favorable to the shipowner than the plain meaning of the word imports.' To the same effect are the remarks of Sir Robert Phillimore in *The Andalusian,* 3 Prob.Div. 182, 190, and in *The Northumbria,* L.R. 3 Adm. 6, 13. Speaking of this statute, *Lord Justice* Brett in *Chapman v. Royal Netherlands Steam Nav. Co.,* L.R. 4 Prob.Div. 157, 184, remarked: 'A statute for the purposes of public policy derogating to the extent of injustice, from the legal rights of individual parties, should be so construed as to do the least possible injustice. This statute, whenever applied, must derogate from the direct right of the shipowner against the other shipowner . . . . It should be so construed as to derogate as little as is possible consistently

with its phraseology, from the otherwise legal rights of the parties.'

> *"While, from the universal habit of insuring vessels, the application of the statute probably results but rarely in an actual injustice to the owner of the injured vessel, yet, being in derogation of the common law, we think the court should not limit the right of the injured party to a recovery beyond what is necessary to effectuate the purposes of Congress."* (Italics added.)

Again in *La Bourgogne,* 210 U.S. 95, 28 S.Ct. 664, 52 L.ed. 973, in dealing with the question of whether the statute shoud be given a strict or liberal construction on the issue of valuation and in referring more particularly to the freight portion of the limitation fund, this Court stated at page 992 of 52 L.ed.:

> "the duty to surrender pending freight to entitle to a limitation of liability must be liberally construed *against* the shipowner." (Italics added.)

The decision of the Court of Appeals can accordingly *not* be supported on the authority of either *Just v. Chambers,* supra, or *Coryell v. Phipps,* supra. Neither case deals with the question of the limitation fund. On the other hand, both *The Main v. Williams* and *La Bourgogne* do deal with that question. They both announce the rule that that question must be determined strictly against the shipowner. In this case, a strict determination of that question against the shipowner can result only in requiring respondent Frode to post a bond covering the value of the "Frej"

at the lawful end of her voyage, on September 18, 1947, in Havana.

SPECIFICATION OF ERRORS 2.

Assuming that the Court of Appeals was justified in fixing the amount of the limitation of liability fund as of a date earlier than the date of the end of the voyage (September 18, 1947), the Court erred in adopting June 19, 1947, as such date, instead of August 4, 1947, the date as of which respondent Frode invoked the limitation statute by filing its petition and posting its ad interim stipulation for value.

Assuming, for the purpose of argument, that the Court of Appeals was correct in holding that the limitation statute gave respondent Frode the right to terminate the voyage short of destination, the only possible date as of which the termination can be held to become effective is August 4, 1947, the date on which the statute was fully complied with by the posting of the required security.

The Court of Appeals now holds (for the first time) that a shipowner may terminate a voyage whenever claims against him exceed the value of the vessel. The Court of Appeals further holds (for the first time) that that right, which the shipowner otherwise would not have, is given him by the limitations statute. If that right *is* given him by the statute, however, the time when the statute is invoked is the only possible time (always bearing in mind that there was neither wreck nor actual completion of the voyage) when the voyage can be terminated.

Section 185 of 46 U.S.C. provides as follows:

> "The vessel owner, . . . may petition a district court of the United States . . . for limitation of liability . . . and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the Court may from time to time fix as necessary to carry out the provisions of section 183 of this title . . . *Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.*" (Italics added.)

Rule 51 of the Admiralty Rules of this Honorable Court provides in part as follows:

> "The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the Act of March 3, 1851, entitled 'An Act to limit the liability of shipowners and for other purposes' (Sections 183 to 189 of Title 46 of the U.S. Code, 46 U.S.C.A. pgg. 183-189) as now or hereafter amended or supplemented, *may file a petition in the proper District Court of the United States, as hereinafter specified.*" (Italics added.)

If Section 185 and the quoted part of rule 51 mean anything, they mean that, in order to be entitled to the benefits of the limitations statute, the shipowner *must first file his petition* and otherwise *comply with the requirements of the statute.*

In *Petition of Goulandris* (C.C.A. 2, 1944), 140 Fed. (2d) 780, certiorari denied 322 U.S. 755, 64 S.Ct. 1268, 88 L.ed. 1584, the Court dismissed a petition for limitation of liability filed within the six months' period and accompanied by a stipulation for costs, on the ground that the petitioning shipowner had failed to comply with the requirements of the statute by either surrendering his vessel or posting adequate security.

In *In re Jacobson,* 52 Fed. (2d) 179, the Court stated at page 180:

> "Limiting as it does the common-law doctrine of responsibility for the acts of servants and agents, *this statute makes a very valuable concession, neither to be frittered away by undue restrictions upon it nor to be incontinently allowed except upon full compliance with the conditions of the grant.* Cases like the Annie Faxon (C.C.A.), 75 F. 312; People's Navigation Co. v. Toxey (C.C.A.), 269 F. 793; Kitsap County v. Harvey (C.C.A.), 15 F. (2d) 166, 48 A.L.R. 1420, in their emphasis upon the difference between the personal and the imputed fault of the owner have tended to overemphasize the exemption from liability; other cases stressing the necessity for compliance with the conditions fixed as the basis for the enjoyment of the exemption have clarified, or at least brought into balance, some of the expressions in those cases. Cases of this kind are Great Lakes Towing Co. v. Mill Transportation Co. (C.C.A.), 155 F. 11, 20, 22 L.R.A. (N.S.) 769; Benner Line v. Pendleton (C.C.A.), 217 F. 497, 500; The Etna Maru (D.C.), 20 F. (2d) 143; Christopher v. Grueby (C.C.A.), 40 F. (2d) 8." (Italics added.)

In *Standard Wholesale P. & A. Works v. Travelers Ins. Co.* (C.C.A. 4, 1939), 107 Fed. (2d) 373, the Court stated at page 376:

> "The right of the owner of a vessel to limit liability is wholly statutory in the United States. The Main v. Williams, 152 U.S. 122, 14 S.Ct. 486, 38 L.ed. 381, and authorities there cited. *To avail himself of this right granted by the statute the owner must bring himself within the terms fixed by the statute. While the purpose of the statute is to protect and encourage maritime commerce and, while statutes of this character are to be liberally construed, this liberality of construction cannot be extended so that express conditions laid down by the statute itself are waived or ignored.*" (Italics added.)

In 1936, Congress amended section 185 to require the shipowner to file his petition for liability within six months after the filing of claims. That amendment was intended to *cut down and not to enlarge the rights of the shipowner.* (See *Petition of Goulandris,* supra; *Standard Wholesale P. & A. Works v. Travelers Ins. Co.,* supra.)

If the Court of Appeals is correct in holding that the limitation statute gives a shipowner a right to terminate the voyage which he otherwise would not have, then the foregoing cases clearly establish that such right cannot be invoked until the petition for limitation is filed *and* until adequate security is posted. In this case, that date is August 4, 1947. Respondent Frode cannot claim that right as of June 19, 1947, for,

on that day, it not only had not filed its petition for limitation, but had not even indicated in any way that it intended ever to do so and, for all that appears, it did not contemplate ever doing so.

The abortive notice of abandonment of June 19 was not enough; it was nothing but an attempt by respondent Frode to escape the contractual obligations under which it was required to refit, repair and complete the voyage to Havana. If the limitation statute now gives the right to terminate the voyage as soon as claims in excess of the value of the vessel have been filed with her owner, it must be required of the owner, before the voyage can be said to have been terminated, that he comply with the statute by filing a petition for limitation of liability and by posting the necessary security. In this case, those requirements were not fully complied with by respondent Frode until August 4, 1947, and that date is accordingly the earliest date as of which respondent Frode can possibly be entitled to limit its liability.

The situation is analogous to that presented under the Bankruptcy Act. Let us assume that on June 19, 1947, respondent Frode was in effect insolvent and would have been entitled to claim the benefit of the Bankruptcy Act as of that date. Let us further assume that, instead of filing a petition in bankruptcy on June 19, respondent Frode elected to wait until August 4, 1947. In that event, the value of its assets, as of August 4, 1947, would be used for bankruptcy purposes.

The situation is exactly the same under the limitation of liability statute and, just as there is only one way to claim the benefits of the Bankruptcy Act, *there is only one way to claim the benefits of the limitation of liability statute*: by filing a petition, posting security and otherwise fully complying with the requirements of the statute. Until that has been done, none of the rights which are given the shipowner by the statute can possibly accrue.

CONCLUSION.

Brief reference should finally be made to the opinion of Judge Pope. Judge Pope states that: "Had the vessel not proceeded to Havana the appellant would have been in no position to contend that the voyage terminated there." We have tried to demonstrate in this brief, as we thought that we had demonstrated in our briefs before the Court of Appeals, that the fact that the "Frej" actually went to Havana is to be considered on the question of her ability to complete her contracted voyage. Our position is that she was not entitled to terminate her voyage short of destination and that her cargo was accordingly entitled to the fund which it would have obtained, had she gone to Havana.

Judge Pope further states that: "I think that Rice Growers are barred by their own agreement from urging that the arrival at Havana constituted the end of the voyage." Judge Pope seemingly overlooks

that the agreement of July 26, 1947, provided as follows:

> "The carrying on of the cargo and/or this agreement shall in no way prejudice any right or rights which *either* party now has and shall not effect the present status quo of the purported abandonment of the voyage at San Francisco, California." (Italics added.)

The word "either" means that not only respondent Frode but also petitioner Rice Growers waived nothing. Specifically, it means that petitioner Rice Growers did not waive its right to contend that the limitation fund should be fixed as of the date on which The "Frej" arrived or should have arrived in Havana.

The limitation of liability fund should accordingly be fixed as of September 18, 1947, at Havana, and should include the following:

(1) The value of the "Frej" at the end of her voyage (Havana).....	$ 275,000.00
(2) The value of her stores at the end of her voyage (Havana).....	16,005.00
(3) The freight for her voyage.....	101,977.03
or a total of.....	$ 392,982.03

In the alternative the limitation of liability fund should be fixed as of August 4, 1947, at San Francisco, and should include the following:

(1) The value of the "Frej" at the time of compliance by her owner with the requirements of the limitation statute	$ 275,000.00

(2) The value of her stores at the time of compliance by her owner with the requirements of the limitation statute	21,825.00
(3) The freight for her voyage.....	101,977.03
or a total of.....	$ 398,802.03

Interest at the rate of 6% per annum from August 4, 1947, shall be added to either amount (R-14).

For the foregoing reasons the decision of the Court of Appeals should be reversed and respondent Frode should be required to post a bond in either of said amounts.

Dated, San Francisco, California,
September 28, 1949.

GEORGE H. HAUERKEN,
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HAUERKEN & ST. CLAIR,
Of Counsel.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1949

No. 360

RICE GROWERS ASSOCIATION OF CALIFORNIA (a corporation),
Petitioner,

vs.

REDERIAKTIEBOLAGET FRODE (a corporation), owner of the Steamship "Frej",
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In the Supreme Court
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RICE GROWERS ASSOCIATION OF CALIFORNIA (a corporation), *Petitioner,*

vs.

REDERIAKTIEBOLAGET FRODE (a corporation), owner of the Steamship "Frej", *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

POINT I.

The decision in this case is not in conflict with local decisions inasmuch as it is governed by admiralty law and no question of local law is involved.

Union Fish Co. v. Erickson, 248 U.S. 308;

Carlisle Packing Co. v. Sandanger, 259 U.S. 255.

POINT II.

The decision in this case is not in conflict with the decisions of this Honorable Court or those of any Court of Appeals on the same subject.

POINT III.

The record clearly establishes that the Court of Appeals did not depart from the accepted and usual course of judicial proceedings.

POINT IV.

The decision of the Court of Appeals is fully and clearly supported by the statutes of the United States and by the rules and previous decisions of this Honorable Court and therefore no reason for granting the petition exists.

ARGUMENT.

The only question presented by the petition is whether the Court of Appeals was correct in holding that for limitation of liability purposes the voyage of the SS FREJ ended in San Francisco on June 19, 1947. (Petition, p. 7.)

A. THE VESSEL AND ITS FREIGHT ARE TO BE VALUED AS OF THE END OF THE VOYAGE.

It is urged by the petitioner and fully supported by the decisions of this Honorable Court that the vessel and its pending freight is to be valued at the end of the voyage for limitation of liability purposes. We agree with that statement.

Place v. Norwich & N. Y. Transportation Co., 118 U.S. 468, 30 L. Ed. 134;

The Great Western, 118 U.S. 520, 30 L. Ed. 156.

It is also urged by the petitioner that the limitation of liability statute "does not concern itself with how" the voyage was "ended". (cf. Petitioner's Brief, p. 32.) We agree with that statement.

B. THE VOYAGE ENDED ON JUNE 19, 1947.

On June 19, 1947 respondent formally abandoned the voyage of the SS FREJ. Respondent at no time rescinded the abandonment or in any way reinstated the voyage which it formally terminated on June 19, 1947.

C. PETITIONER'S ARGUMENTS BASED ON THE LAW OF CONTRACTS ARE IRRELEVANT AND THOSE BASED ON THE SUBSEQUENT ACTIVITIES OF THE VESSEL ARE CONTRARY TO ITS STIPULATION.

The only arguments which petitioner advances to support its contention that the June 19, 1947 abandonment of the voyage should be disregarded as ending the voyage are, first, the argument that such abandon-

ment constituted a breach of contract between the vessel and that portion of its cargo which remained fit to continue the voyage, and, second, reference to the fact that the vessel subsequently, pursuant to a separate agreement, proceeded to Havana with the sound portion of the original cargo on board.

(1) The voyage ended on June 19, 1947 by abandonment, whether or not the abandonment was a breach of contract as to sound cargo.

Petitioner's first argument has no merit. Regardless of whether the abandonment of the voyage on June 19, 1947 constituted a breach of contract as to the sound cargo (respondent believes the abandonment was proper under the law of contracts even as to the sound cargo, and the Court of Appeals found it unnecessary to pass on the point, Rec. p. 108), there was and could be no breach of contract arising from the voyage abandonment as to the damaged cargo which at petitioner's request was discharged and disposed of at San Francisco as being unfit for on-carriage. Petitioner's entire claim, the subject of the litigation in the District Court, concerns only the damaged cargo which was disposed of at San Francisco and as to which the voyage was clearly ended at San Francisco.

The extensive arguments (Petitioner's Brief, pp. 20-35) advanced by petitioner questioning the contractual propriety of the abandonment of the voyage by respondent are not in any way relevant to any question in the case. Whether the abandonment was proper or improper, whether in abandoning the voyage the respondent did or did not incur contractual liabilities to

the *sound cargo* to the crew or others, the fact remains that as to the *damaged cargo* the voyage by the abandonment was ended and the value of the vessel and its pending freight is to be taken at *the end of the voyage* on June 19, 1947.

(2) Petitioner's argument for valuation at Havana violates its own stipulation.

Petitioner's second argument, based on the fact that the vessel later in fact proceeded to Havana, is an argument which it is not proper for petitioner to advance and which is contrary to petitioner's own stipulation. After the abandonment of the voyage and under an entirely new arrangement on July 26, 1947 and before the repairs to the vessel were completed, the parties entered into a memorandum agreement for the carriage of the sound cargo to Havana (Rec., p. 51) which contained among other provisions the stipulation:

> "6. The carrying on of the cargo * * * shall not affect the present status quo of the purported abandonment of the voyage at San Francisco, Calif."

The impropriety of petitioner's basing its argument, contrary to its stipulation, on the fact that the vessel proceeded to Havana is well discussed in Judge Pope's concurring opinion in the Court of Appeals. (Rec., pp. 109-110.)

D. ALTHOUGH NOT RELEVANT TO THIS CASE, RESPONDENT'S ABANDONMENT OF THE VOYAGE ON JUNE 19, 1947 WAS JUSTIFIED UNDER THE LAW OF CONTRACTS.

Although completely irrelevant to any question properly presented in this case, the extensive arguments advanced by petitioner respecting the propriety of the abandonment of the voyage constrain respondent to show that the abandonment was proper, even under the law of contracts, and that the cases cited by petitioner do not support petitioner's position.

On June 19, 1947 when respondent abandoned the voyage, respondent found as a result of the fire occurring on May 6-7, 1947 that the SS FREJ was faced with claims aggregating $415,990 ($50,000 by salvage claimants and $365,990 by your present petitioner) plus damage to the vessel which would cost $167,498.99 to repair, or a minimum threatened expense for the venture, if continued, of $583,488.99 as compared with the value of the wreck and stores on May 8, 1947 of $114,329 and on June 19, 1947, of $120,000. The repairs required by reason of fire damage ($167,498.99) were 158% of the value of the wreck ($106,000). In such circumstances the abandonment of the voyage by respondent was clearly reasonable and justified even under the law of contracts.

The cases cited by petitioner respecting the duty of a vessel to repair and continue its voyage (*Assicurazioni Generali v. S. S. Bessie Morris Co.* (1892), 1 Q. B. 571 and *The Maggie Hammond,* 9 Wall. 435, 19 L. Ed. 772) have no relevance to the instant case since both cases concern the contractual relations

between the vessel and cargo to be on-carried, not, as in this case, the amount of the limitation of liability fund to be established in connection with claims asserted by reason of damages to cargo which was discharged and disposed of by agreement at the port of refuge. In addition, the case of *The Maggie Hammond* does not concern a catastrophe in any way comparable to that suffered by the SS FREJ. The total value of *The Maggie Hammond* does not appear from the reports but it does appear that the total out-of-pocket cost for effecting the necessary repairs was 55/17 (as compared to $167,498.99 for the SS FREJ). In so far as *Assicurazioni Generali,* cited by petitioner, appears to support petitioner's proposition that the shipowner may not abandon the voyage when the vessel suffers damage exceeding the value of the wreck, the case must be deemed overruled by the House of Lords in *Macbeth & Co. v. Maritime Insurance Co.* (1900) A.C. 144, XI Aspinall's Maritime Cases (N.S.) p. 52. Under the rule announced in the *Macbeth* case, i.e., that a vessel may be deemed a constructive total loss where the value of the wreck plus the cost of repairing it would exceed the value of the vessel when repaired, the SS FREJ (the value of the wreck and its repairs exceeding its repaired value by $15,848) would be deemed a constructive total loss, i.e., the vessel suffered such damage that an owner with reasonable prudence and discretion would be convinced that the vessel could not be repaired without hazard of disproportionate expense. *Arnould on Marine Insurance,* 6th ed., sec. 1117, p. 1432.

E. PETITIONER'S ARGUMENTS FOR VALUATION AS OF AUGUST 4, 1947 ARE IN DIRECT CONFLICT WITH THE PRIOR DECISIONS OF THIS HONORABLE COURT.

In contending that the vessel and its pending freight should be valued as of August 4, 1947, petitioner is contending for valuation as of a date other than the end of the voyage. This is contrary to the previous decisions of this Honorable Court on the same subject. In *Place v. Norwich and N. Y. Transportation Co.*, 118 U.S. 468, 30 L. Ed. 134, this Honorable Court had before it a similar situation in which the cargo was attempting to obtain in fixing the amount of the limitation of liability fund the benefit of increased value due to repairs which the owner had effected after the catastrophe and the termination of the voyage. In that similar situation this Honorable Court affirmed that the vessel and its freight are to be valued as of the end of the voyage and that the cargo claimants have no interest in increased value arising from the repairing of the vessel, saying:

> "Their (the shipowner's) liability is fixed when voyage is ended. The subsequent history of the wreck can only furnish evidence of its value at that point of time. * * * This provision is absolute and the owner may have the benefit of it, not only by a surrender of the ship and freight, but by paying into court the amount of their value, *appraised as of the time when liability is fixed.* This, as we have seen, enables the owner to reclaim the ship and put it into complete repair, without increasing the amount of his liability. * * *" (Emphasis supplied.)

CONCLUSION.

It is respectfully requested that this Honorable Court deny the petition for writ of certiorari.

Dated, San Francisco, California,
October 28, 1949.

Respectfully submitted,
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Proctor for Respondent.

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Of Counsel.